76-435

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1878

F. W. WOOLWORTH COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 25, 1976.

Citations to Opinions Below

The Findings of Fact and Conclusions of Law and the order of the NLRB printed in Appendix C hereto, infra, pp. C-6a-23a, were reported in 216 NLRB No. 155, 88 LRRM 1516. The opinion of the Court of Appeals for the Fifth Circuit, printed in Appendix B hereto, infra, pp. B-3a-5a, is reported in 530 F. 2d 1245. Denial of a rehearing and rehearing *en banc*, was issued on July 2, 1976.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether, absent a prior posted no-distribution, no-solicitation rule, an employer may, without disciplining an employee, remove union literature from unattended work stations coincident with the start of the employees' work day in order to prevent disruption and litter in the area.

2. Whether an employer may express a privileged opinion on unionization under 8(c) of the Act, without forfeiting its conceded right, to prohibit the distribution of union propaganda in working areas.

3. Whether one statement, lawful under 8(c) of the Act, may support a finding of interference, when substantial evidence to the contrary exists in the record when viewed as a whole.

Statute Involved

The statutory provisions involved are Section 7 and 8(a)(1) of the National Labor Relations Act as amended, 29 U.S.C. §151, et seq. (the "Act"). They are printed in Appendix D, infra, p. D-24a.

Statement of the Case

This petitioner seeks review of a judgment of the Court of Appeals for the Fifth Circuit enforcing an order of the

National Labor Relations Board (NLRB) requiring petitioner to cease and desist from interfering, restraining or coercing its employees in violation of their rights under Section 7 of the "Act."

A charge was filed with the NLRB against petitioner alleging interference by petitioner with the organizational activity of its employees arising out of petitioner's removal of union literature from unattended work stations immediately prior to the commencement of the employees' work day. A hearing was held, upon issuance of a complaint by the Regional Director of the NLRB, and the Administrative Law Judge found a violation of Section 8(a)(1) of the Act, based upon petitioner's conduct of returning "postage paid" union authorization cards—which were attached to the union literature and removed by petitioner—to the union's office.

The Administrative Law Judge ordered the petitioner to cease and desist from interfering with the distribution of union literature and authorization cards and to post notices to that effect at its offices. Petitioner was not ordered to reimburse the union for postage fees incurred by the union as a result of the returned mailing. The Administrative Law Judge's decision and recommended order is reprinted in Appendix C, infra, pp. C-6a-23a.

The NLRB, in reviewing the Administrative Law Judge's decision, affirmed the rulings, findings and conclusions of the Judge and adopted her recommended order that petitioner cease interfering with the organizational rights of employees and, ordered the petitioner to reimburse the union for the postage costs which the union would not have incurred had the respondent not mailed the unsigned authorization cards to the union.

Petitioner filed a petition for review of the Board's order and the Board filed a cross-petition for enforcement.

Upon appeal, the Court of Appeals for the Fifth Circuit granted enforcement of the order of the National Labor Relations Board and subsequently denied petitioner's petition for rehearing and rehearing *en banc*.

This case arose out of an organizational campaign conducted by a union at petitioner's central accounting office where approximately 700 clerical personnel are employed. Employees used an outdoor parking lot, ate at lunch rooms made available by the Employer, enjoyed the use of at least four employee lounges and a lobby during break periods, pre-work time and other non-work time, and also had access to rest rooms in various non-work areas on the premises. Almost all employees commence work at 8:00 a.m.

On November 9, 1973, the Union began a massive organizing campaign utilizing employees of the petitioner as its agents in the distribution of literature in the office. Prior to 8:00 a.m. on November 9, certain employees distributed organizational literature, placing the material on the desks or work stations of employees eligible to affiliate with the union and to vote in an NLRB election. Authorization cards in the form of post cards with the union's return address marked "postage paid" were attached to the literature. The cards requested employees to sign an application for membership and to return the cards to the union. This method of distribution, as well as other typical methods of solicitation continued thereafter during the next several months. In all respects, each side campaigned vigorously in order to induce a favorable vote. An election was conducted, resulting in a defeat of the union.

After the union distributed materials on two occasions in the work areas of its offices, the petitioner took steps to

avoid the use of its own work areas as campaign territory for the union. On December 13, one of the days when certain of petitioner's employees distributed union literature in the office, four of petitioner's supervisors removed the literature from *unattended* desks and work stations. The removal was accomplished between 7:45 a.m. and 8:15 a.m. One of the supervisors, while picking up the literature and the attached authorization cards, stated ". . . it was lucky he got there before the employees, and that he would fix the union by mailing the authorization cards back to the union so that the union will have to pay for them."

No other supervisor was reported to have made any remarks in connection with the removal of the literature on that occasion or on any of the other six occasions when petitioner's employees distributed literature.

Where employees were stationed at the desks at the time supervisors arrived, the campaign literature and attached cards were left in their employees' possession.

At the time the union's organizational campaign commenced, the petitioner did not issue any written or verbal instructions to its employees regarding the littering resulting from the distribution of the union's propaganda. During the campaign, no change was made in the petitioner's policy of allowing employees to distribute literature, nor was any employee reprimanded, disciplined, or discharged for having engaged in the distribution of union literature.

At the time the petitioner removed the literature from work areas, it acted completely in accordance with existing law. The landmark NLRB decision, itself, a reflection of pre-existing Supreme Court rulings, held that the organizational rights of employees require only that they have access to *non-working* areas of the employer's premises when engaging in the distribution of literature. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962).

Reasons for Granting Review

The Free Speech Issue.

The magnitude of the threat posed by the decision below to an employer's First Amendment right to express its lawful views, is extreme. Section 8(c) of the Act was specifically intended to implement the First Amendment and to prevent the Board from using unrelated, non-coercive expressions of opinion on union matters, as evidence of a general course of unfair labor conduct. The legislative history of the 1947 amendments to the Act clearly reveals an expressed fear that the NLRB had taken an excessively harsh view of employer expressions of opinion, in the context of union organizational campaigns. *Senate Report No. 105,* p. 23, specifies:

> "The Committee believes these decisions [of the NLRB] to be too restrictive and, in this section, provides that if under all these circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence."

Petitioner, throughout a long and heated union-organizing campaign, was meticulous in keeping its campaign conduct, communications, and other statements well within the boundaries of the Act. Not one statement made by petitioner to its employees during the course of the contentious campaign was held to be an unfair labor practice. However, when *one supervisor,* on a *single* occasion, made an isolated, brief statement while collecting union propaganda from the work stations of employees, that statement (to the effect that he would fix the union by mailing union

authorization cards back to the Union office unsigned) was used as the basis for finding that the conduct of the petitioner in collecting the union propaganda, constituted interference under Section 8(a)(1) of the Act.

The use of such a statement as a total predicate for the finding of unlawful interference, completely ignores this Court's teaching of the subject of employers' statements during the course of an organizational campaign. In *NLRB v. Gisell Packing Co.,* 395 U.S. 575 (1969), it was declared:

> "But we do note that an Employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, Section 8(c) (29 U.S.C., §158(c) (1964 Ed.)), merely implements the First Amendment by requiring that the expression of 'any views, argument or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force, or promise of benefit' in violation of Section 8(a)(1).

The decision below clearly ignores the Supreme Court's firmly established standard that the free speech right to communicate views to employees cannot be infringed upon in the absence of a threat or a promise to employees. This Court is thus presented with a blatant case of the Board's extreme propensity to curtail the free speech rights of employers. Absent review by this Court and a reversal of the decision below, there will be no control upon the Board's inclination to find unfair labor practices to have been committed on the basis of statements which are admittedly protected by the free speech proviso to the Act.

The Board in the decision below, viewed an isolated and ambiguous statement, representing the desire of a supervisor to cause the union an additional expense (unquali-

fiedly privileged under the provisions of 8(c) of the Act), as a basis for stamping petitioner with illegal anti-union animus. This was done in the face of an impeccable record of complete freedom from any tinge or suggestion of an unfair labor practice or illegel statement during the petitioner's winning campaign. An employer's right under federal labor policy to issue such utterances without fear that the statement would incriminate itself in other areas, was the issue determined by the decision below. The federal right, however, was resolved in a manner which conflicts with all of the applicable decisions of this Court. If left unreversed by this Court, it can then be considered that an employer's right to "free speech" has been watered down to the status that such right occupied prior to the 1947 amendments to the Act as a result of improper exercise of NLRB and court authority. A review of this Court to check this untamed desire on the part of the Board to use protected statements as a basis for finding unfair labor practices, is an absolute imperative if the integrity of Section 8(c) is to be upheld in this, and the multitude of future free speech cases which arise daily under the National Labor Relations Act.

The Substantial Evidence Doctrine.

Sound judicial administration of federal labor policy commands that this Court review the substantial evidence aspects of the decision below.

A no-distribution rule, which is basic to the operation of an employing enterprise, must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. This is the clear teaching of this Court's decisions in *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793 (1945) and *NLRB* v. *Steelworkers,* 357 U.S. 357 (1958). Together, these decisions held that the Act does

not confer upon employees the right to use the property of their employer for union purposes during working hours, over the objection of the employer.

It is exceptionally clear that the petitioner's conduct in removing literature distributed in work areas, which an employer has a lawful right to prevent, is valid, *unless* there is evidence in the record to overcome the strong presumption of validity. The NLRB found the petitioner's rule to be invalid as not being promulgated for purposes of avoiding litter and distraction of employees, but, rather, as being established for the purpose of coercing employees in the exercise of their right to self organization.

While the reviewing court was bound by the Board's finding of fact and by reasonable inferences drawn from those facts (providing they are supported by substantial evidence in the record as a whole), the Board's inference that the employer removed union literature from work areas for illegal, discriminatory and coercive purposes is *completely without support.* The extreme danger of the decision below to the administration of the Act is apparent. If *this case* is left unreversed, the NLRB would have untrammelled reign to wipe out important employer rights and to erode fundamental labor policy.

A review of all the evidence in this case demonstrates a one-sided array of facts clearly showing a lack of any discriminatory purpose on the part of the petitioner. For example: (1) the petitioner did not begin to remove literature until after the union had engaged in *several* acts of distribution of literature in work areas; (2) petitioner had an extremely permissive attitude towards solicitation; (3) it freely allowed union discussion and dialogue to take place; (4) it posted no rule otherwise inhibiting solicitation or distribution; (5) there is no showing in the record

that the petitioner allowed other organizations to distribute literature in work areas but prohibited the organizing union from engaging in the same conduct; (6) the union had wide access to the employees of petitioner as they reported to work and at the conclusion of the work day, as well as in the parking lot used by petitioner's employees; (7) the same employees of petitioner who freely distributed union propaganda in work areas could have distributed the literature not only in petitioner's parking lot, but also, in at least four employee lounges and in lunch areas; (8) the union could have used the mails (names and addresses of employees were supplied to the union by the employer); (9) the union could have met at local pubs or restaurants, and could have distributed handbills as employees reported to work or left for the day so as not to run the risk that the materials would be collected by the petitioner; (10) the Company allowed employees to distribute union organizational literature on Company premises in non-work areas without restriction; (11) employer representatives testified that the purpose for removing literature was to prevent litter and to avoid disruption of working time; (12) throughout the campaign there were an *enormous* number of opportunities for the Union to solicit employees and also to distribute literature in non-work areas which were available for such distribution.

No contrary testimony was adduced!

By its very nature, solicitation and distribution of propaganda material causes argument and dissension among employees. Every experienced, capable businessman would know the disruptive effect which union distributions in work areas would have on plant or office efficiency and production. Yet, the reason the Board focused upon for rebutting the presumption of validity of the employer's conduct was the supervisor's statement that he would "fix"

the union by returning the materials placed on employee desks to the union's offices by mail. The Fifth Circuit's opinion, *without discussing the nature and quality of the evidence in support of the Board's decision,* merely stated that there was substantial evidence on the record as a whole to support the Board's conclusion. However, there is no support other than the supervisor's statement, which, if analyzed, is, by itself, *not* evidence that the gathering up of union propaganda was intended to coerce employees within the meaning of the Act. The evidence as a whole shows that the employer was engaged in guarding its working time, and that it acted only after several abuses on the part of the union. The supervisor's statement, *at most,* displays the Company's privileged, firm attitude against continued distributions. In the absence of evidence, there is no presumption of intent to disobey the law. The presumption of the validity of no solicitation/no distribution rules established by this Court was intended to decrease conflict by increasing the certainty of rights. Under the presumption of validty, employers can act with the knowledge and assurance that they may protect their property and working time without fear of unlawful activity. The decision below tampers with the presumptions and creates extreme uncertainty together with the abridgement of the right to operate an enterprise efficiently in the face of a union organizing campaign.

The evidence in support of the Board's conclusion, as enforced in the Fifth Circuit, is so completely lacking in quality of substantive evidence, as well as quantity, that it defies all notions of substantial evidence as established by this Court in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1950). The method used by the NLRB in striking down the employer's attempts to protect its property from union incursion, is completely alien to the concept of sub-

stantial evidence. If left unreversed, the NLRB would have untrammeled power to find violations of law based upon evidence so scant as to be invisible. If left unreversed, litigants before the Board would be left powerless to achieve any type of meaningful review of Board determinations.

The Right to Protect Property and Work Time.

The petitioner's absolute right to prevent the distribution of union propaganda in its work areas was destroyed by the decisions below on the grounds that the petitioner did not have a pre-existing no solicitation/no distribution rule (17a, lines 26, 27). The pre-existence of a rule is completely irrelevant to the exercise of an employer's right to prevent the distribtion of disruptive union propaganda material in work areas. An employer need not promulgate a rule in order to allow itself to act in a manner which is lawful to begin with.

Since 1945, when the Supreme Court established the vital principles governing an employer's right to protect its premises against the invasion of literature, employers have been uniformly allowed to safeguard their premises against distribution of union propaganda in work areas. *Republic Aviation Corp., supra.* The petitioner in this case acted completely in accordance with both Supreme Court and current NLRB rulings when it removed the literature which had been placed upon employee work stations by petitioner's employees. It had the right, not only to protect its work areas from litter, but also to prevent actual and potential disruption of employee work time occasioned by the union propaganda being placed on clerical desks immediately prior to the beginning of the work day. This right is conceded. See, *Stoddard Quirk Mfg. Co.*, p. 5, *supra.* The sole basis upon which this fundamental right was destroyed was the one isolated and ambiguous statement of a supervisor that he would "fix" the union by removing the literature placed in employee work stations and mailing the unsigned solicitation cards back to the union. Thus, important property rights established by this Court more than 30 years ago, were implied away on the basis of this single lawful statement.

The decisions below are *dangerous* in that they set the stage for subsequent erosions of extremely important employer safeguards, and would seriously impair valid, bona fide and completely legal no solicitation and no distribution rules, and the protection afforded employers under such rules. Such critical rights should not be stripped away on the basis of completely lawful statements by supervisors. This approach throws a monkey wrench into the established concepts underlying the administration of no solicitation/no distribution rules originally established by this Court decades ago.

The decisions below amount to an unnecessary and unjustifiable imposition upon the protection of property rights which should be rectified once and for all by this Court. Hundreds of thousands of employers operate their businesses without thought of possible union intrusion into their affairs. Yet, when a union does appear on the scene, an employer should be legally justified in protecting its premises under existing NLRB decisions, without (a) the necessity of a pre-existing rule and (b) without being prejudiced by its own lawful statements on the union presence. The jeopardy which would be experienced by employers without the foresight to adopt legally complex no solicitation/no distribution rules, warrants the considered opinion of this Court on an issue affecting the critical property rights of countless employers when confronted with union organizational campaigns.

The question of central importance in analyzing the decision below, is whether the ruling, which found the petitioner in violation of law for collecting materials distributed in work areas, is based on the policy established by Supreme Court in *Republic Aviation*, or whether it deviates from that policy.

To the extent that the decision below interfered with the employer's property right to prevent potential and actual interference with its working time, and to prevent litter in its office, the ruling below did not conform to the overall desirable federal policy established by this Court, of limiting undue interference with employer property rights during organizational campaigns.

The Right to Express Valid Opposition to Unionization.

The dominant weakness of the opinion below is that it chills, if not absolutely freezes, the rights of an employer to express justifiable views and opinions against a union attempting to organize its employees.

This Court, in *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, (1965) held that economic action taken by an employer, even if "motivated by vindictiveness towards the union", is not an unfair labor practice. The supervisor's statement that the cards were being returned so as to "fix the union", *at worst*, can be viewed as a spiteful statement expressing a vindictive desire to cause the union the additional postage expense involved in mailing the prepaid postal cards back to the union, unsigned. Yet, that statement was the *sole* focus of the Board when it determined that the employer's conduct in protecting its work time from potential distraction was illegal. In the Board's view, the supposedly spiteful statement tainted what was an otherwise completely lawful act, i.e., the removal of literature distributed in working areas. In effect, the Board and the Fifth Circuit equated anti-union spite and vindictiveness (at worst) with illegality. Such thinking rejects Supreme Court law, for, this Court has specifically held in *Darlington, supra:*

> "It [the employer] may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act."

The court went on further to state:

> "We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."

The Board's mischevious decision, and its enforcement by the Fifth Circuit, can only invite future decisions which seriously invade the principle that an employer cannot be penalized because of its anti-union bias. The conduct of the petitioner's supervisor, herein, and his *belief* that he could annoy the union by returning unsigned authorization cards, penalized the petitioner's right to protect its property. Absent the supervisor's statement, the Board, itself, concedes that the removal of literature would have been entirely privileged and lawful.

Petitioner's supervisor did not like the idea of a union organizing the petitioner's employees, nor was he required to. His remark was privileged under the law. The right of an employer to express lawful opposition to a union without prejudice to the exercise of any of its other lawful rights raises an important question of federal labor policy, which should be settled by this Court. Review by this Court is necessary in order to correct the Board's dangerous and

erroneous conception that lawful election conduct can support determinations that violations of the Act have been committed. At a time when free speech has assumed such a critical role in our society, the public significance of an employer's right to declare itself as opposed to unionization, cannot be understated.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

Judgment

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 75-1878

F. W. Woolworth Co.,

Petitioner,

v.

National Labor Relations Board,

Respondent.

Before:

Godbold and Roney, *Circuit Judges,*
and Hill, *District Judge.*

This Cause came on to be heard upon a petition, filed by F. W. Woolworth Company, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on March 10, 1975, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on February 4, 1976, and has considered the briefs and transcript of record filed in this cause. On April 30, 1976, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

Appendix A

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that F. W. Woolworth Co., (Milwaukee, Wisconsin) its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: June 25, 1976

Issued as Mandate: July 12, 1976

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals
Fifth Circuit
By /s/ MARY BETH BREAUX
Deputy
New Orleans, Louisiana

Appendix B

Decision of Fifth Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-1878

F. W. WOOLWORTH COMPANY,
Petitioner-Cross Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

April 30, 1976

Proceeding was brought for review of order of National Labor Relations Board, which filed cross application for enforcement. The Court of Appeals held that, in view of finding that employer's objective was not protection of its property interests but to discourage union activity, employer's seizure, in absence of posted rule against distribution of literature in working areas, of union literature which had been placed on unattended desks and working stations prior to beginning of working hours and mailing to union of some of seized material in prepaid envelopes attached thereto violated National Labor Relations Act.

Order enforced.

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In view of finding that employer's objective was not protection of its property interests but to discourage union activity, employer's seizure, in absence of posted rule against distribution of literature in working areas, of union literature which had been placed on unattended desks and working stations prior to beginning of working hours and mailing to union of some of seized material in prepaid envelopes attached thereto violated National Labor Relations Act. National Labor Relations Act, § 8 (a)(1) as amended 29 U.S.C.A. § 158(a)(1).

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Louisiana Case).

Before:

GODBOLD and RONEY, *Circuit Judges*,
and HILL, *District Judge*.

PER CURIAM:

The Board found that the employer violated § 8(a)(1) by seizing union literature that had been distributed by the union to employees in its central accounting office and by mailing to the union some of the seized material consisting of unsigned authorization cards in prepaid envelopes that had been attached thereto.

The literature was placed on unattended desks and working stations prior to the beginning of working hours. No literature was taken away from any employee, and the employer did not interfere with the distribution. The

Appendix B

employer had no posted rule against distribution of literature in working areas.

This case is not controlled, as the employer claims, by *Patio Foods* v. *N.L.R.B.*, 415 F.2d 1001 (CA5 1969). There we held that, absent a rule against distribution of literature in working areas, the employer's interest in cleanliness and order in a working area justified a prohibition on handbilling. The record in the present case adequately supports the Board's finding that the employer's objective was not the protection of its property interests as in *Patio Foods* but rather to discourage union activity. In view of that finding the Order of the Board is ENFORCED.

Appendix C

Decision of Administrative Law Judge of the National Labor Relations Board

JD-641-74
Milwaukee, Wisc.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Case No. 30-CA-2564

F. W. WOOLWORTH CO.,

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,
LOCAL NO. 9, AFL-CIO.

GEORGE STRICK, ESQ.,
Milwaukee, Wisc.,
for the General Counsel.

CHRISTOPHER J. HOEY, ESQ.,
and
JAMES J. PIRRETTI, ESQ.,
New York, N. Y.,
for the Respondent.

MICHAEL WALKER,
Bus. Rep., Milwaukee, Wisc.,
for the Charging Party.

Appendix C

Statement of the Case

ANNE F. SCHLEZINGER, Administrative Law Judge: Upon a charge filed on December 19, 1973, by Office and Professional Employees International Union, Local No. 9, AFL-CIO, referred to herein as the Charging Party or the Union, the General Counsel, by the Regional Director for Region 30 (Milwaukee, Wisconsin), issued a complaint and notice of hearing on January 29, 1974. The complaint, as amended at the hearing, alleges in substance that F. W. Woolworth Co., herein called the Respondent, interfered with the distribution of Union literature at its central accounting office by removing from employee work stations Union pamphlets which had been distributed prior to the employees' starting time, and by mailing to the Union unsigned authorization cards after detaching them from such pamphlets, and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, in violation of Section 8(a)(1) of the Act. The Respondent, in its answer duly filed, admits certain factual allegations of the complaint, but denies that its conduct has interfered with the Section 7 rights of its employees.

A hearing in this matter, scheduled to be held on March 4, 1974, was on March 1 postponed indefinitely pending a ruling by the Board on the General Counsel's Motion for Summary Judgment, which was filed on March 7. The Respondent on March 15 filed a Motion for Dismissal of Complaint and Memorandum in Opposition to General Counsel's Motion for Summary Judgment. On March 22, the General Counsel filed a Motion to Strike, urging that certain statements made in the Respondent's Memorandum be stricken. Also on March 22, the Board

issued an Order Transferring Proceeding to the Board and Notice to Show Cause, providing for cause to be shown in writing filed on or before April 5 why the General Counsel's Motion for Summary Judgment should not be granted. On April 3, the Respondent filed a Memorandum in Opposition to General Counsel's Motion to Strike. The General Counsel filed a Second Motion to Strike, dated April 9, urging that certain statements made in the Respondent's Opposition and an affidavit attached thereto be stricken, or in the alternative that the matter be remanded for a hearing, and the Respondent filed a Memorandum in Opposition to General Counsel's Second Motion to Strike.

On May 30, 1974, the Board issued an Order Denying Motions and Remanding for Hearing, in which it denied the General Counsel's Motion for Summary Judgment and Motions to Strike, denied the Respondent's Motion to Dismiss the Complaint, and ordered that a hearing be held before an Administrative Law Judge for the purpose of receiving evidence on the issues raised by the parties, and that the Judge prepare a decision containing findings of fact, conclusions of law, and recommendations based upon the evidence received.

Pursuant to Orders Rescheduling Hearing, a hearing was held before the undersigned Administrative Law Judge at Milwaukee, Wisconsin, on August 1. All parties appeared at the hearing and were afforded full opportunity to be heard and to introduce relevant evidence. The parties called no witnesses, but agreed on the introduction into evidence of certain documents and entered into stipulations of fact. The General Counsel was permitted, over the Respondent's objection as to timeliness, to amend the complaint, and the Respondent amended its answer. Subsequent to the hearing, the General Counsel filed a memorandum and the Respondent filed a brief on or about August 23, 1974, which have been duly considered.

Upon the entire record in this proceeding, I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, a New York corporation, is engaged in the operation of retail stores located throughout the United States. It maintains in Milwaukee, Wisconsin, a central accounting office for all its operations, which is the only facility of the Respondent involved herein. During the past calendar year, a representative period, the Respondent's gross receipts exceeded $500,000. During this same period, the Respondent purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. The complaint alleges, the Respondent in its answer admits, and I find, that the Respondent is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the Respondent in its answer admits, and I find, that Office and Professional Employees Union, Local No. 9, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The facts*

The complaint, as amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the Act by (a)

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the conduct of admitted supervisors Anderson, Bolton, Snortum, and Skong, on or about December 13, 1973, and February 4, 1974, in interfering with the distribution of Union literature by removing from employee work stations pamphlets, with Union authorization cards attached, which had been distributed to employees prior to their starting time; (b) the conduct of the Respondent, on or about the same dates, in mailing to the Union unsigned Union authorization cards which the Respondent had detached from the above-mentioned Union pamphlets; and (c) the conduct of the above-named supervisors, shortly after the employees' starting time on or about February 20, 1974, in interfering with the distribution of Union literature by removing from employee work stations, shortly after the employees' starting time, Union literature which had been distributed to employees prior to their starting time.

The Respondent, in its answer as amended at the hearing, admitted engaging in the conduct described in (a) and (b), and in (c) with the caveat that the conduct in question occurred at unattended work stations, but denied that this conduct was violative of the Act.

At the hearing, the parties entered into a stipulation as to the following facts:[1] (1) organizing by the Union began about November 9, 1973, at the Respondent's central accounting office in Milwaukee, where about 700 employees work, of whom about 600 start work at 8 a.m.;[2] (2) on or

[1] The Respondent stipulated to the accuracy of these facts but indicated that it questioned the relevancy of some of them.

[2] Documents introduced into evidence by the Respondent show that there are four entrances to the premises which occupy two floors, that there are about four employee lounges at different locations on the two floors, and that the employees are classified into seven groups for lunch and rest-period schedules. The Respondent distributes bulletins from time to time changing these schedules. The beginning of the lunch-period, for example, ranges from 11:10 a.m. for Group 1 to 12:30 p.m. for Group 7.

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about November 20, unit employees went through the central accounting office before 8 a.m. and placed a document referred to as ETA Number 1[3] on the desk or work station of every non-supervisory employee, and no supervisor or member of management collected this document; (3) on or about December 4, unit employees went through the central accounting office before 8 a.m. and placed a document referred to as ETA Number 2 on the desk or work station of every non-supervisory employee, and no supervisor or member of management collected that document; (4) on or about December 6, the Respondent distributed to all non-supervisory employees in the central accounting office, at their work stations during work time, a response to the aforementioned documents; (5) on or about December 13, unit employees went through the central accounting office before 8 a.m. and placed ETA Number 3 and attachments on the desks and work stations of every non-supervisory employee; (6) on or about December 13, supervisors Anderson, Bolton, Snortum, and Skong removed ETA Number 3 and attachments from unattended desks and work stations of unit employees between 7:45 and 8:15 a.m.; (7) the statement of supervisor Anderson on or about December 13, while picking up ETA Number 3 and attachments from the desks and work stations of unit employees, was "that it was lucky he got there before the employees and that he would fix the union by mailing the authorization cards back to the union so that the union will have to pay for them"; (8) on or about December 14, the Union received in the mail approximately 126 unsigned authorization cards in prepaid envelopes at the cost of $12.60; (9) on or about February 4, 1974, unit employees

[3] These documents are entitled "Employees Taking Action."

went through the central accounting office before 8 a.m. and placed ETA Number 4 with its attachments on the desk and work station of every non-supervisory employee; (10) on or about February 4, supervisors Anderson, Bolton, Snortum, and Skong removed ETA Number 4 with its attachments from unattended desks and work stations of unit employees between 7:45 and 8:15 a.m.; (11) the statement of supervisor Anderson on or about February 4, while picking up ETA Number 4 and attachments from desks and work stations of unit employees, was that he was not interested in the letters, only the attached cards; (12) on or about February 11, the Union received in the mail approximately 150 unsigned authorization cards at the cost of $15, and another 21 authorization cards were sent special delivery but were refused by the Union; (13) on or about February 20, unit employees went through the central accounting office before 8 a.m. and placed ETA Number 5 on the desks and work stations of unit employees; (14) on or about February 20, supervisors Anderson, Bolton, Snortum, and Skong removed ETA Number 5 from unattended desks and work stations of unit employees between 7:45 and 8:15 a.m.; (15) between November 1973 and February 28, 1974, the Respondent did not issue any written or verbal instructions to unit employees regarding littering resulting from the distribution of the ETA's; (16) between November 1973 and March 1, 1974, the Respondent did not hire extra janitorial staff resulting from the distribution of the ETA's; (17) between November 1973 and March 1, 1974, the Respondent did not issue any written or verbal instructions to unit employees regarding security at the central accounting office as a result of the distributions of the ETA's; (18) the Respondent does distribute to all unit employees, at their desks and work stations in

the central accounting office, literature and pamphlets regarding sports activities sponsored by the Respondent, and literature regarding certain sales of merchandise by the Respondent in the "County Store"; and (19) on or about May 28, 1974, the Union filed a petition docketed as Case No. 30-RC-2338, a hearing was conducted in that case on June 20 and 24, and on July 24 the Regional Director for Region 30 issued a Decision and Direction of Election for all employees at the central accounting office, including office clericals, cafeteria, maintenance, shipping and receiving employees, and mail drivers, but excluding confidential employees, nurse, computer programmers, managerial employees, guards, and supervisors as defined in the Act.

The Respondent distributed to its employees during work time written responses to some of the ETA leaflets, signed by Bain, the general manager. One, referred to in stipulated fact (4), *supra,* was distributed by the Respondent on December 6, 1973, and was introduced into evidence by the General Counsel. It interpreted ETA to mean "Evade Truthful Answers," warned that the Union might bargain away existing employee benefits for Union benefits, and urged that employees should "Remember these points when one of these 'Truth Evaders' or organizers ask you to sign a card. I am sure you will refuse."

Two other responses by Bain were introduced into evidence by the Respondent. In one, which was distributed on March 1, 1974, Bain stated that "Last week the union passed out another of its sheets in this office"; that although he "never intended to get into a debate with a group of nameless, faceless organizers," he had to answer some of the Union's comments; that the Board "had issued a complaint alleging that supervisors in this office made a mistake when they picked up some leaflets left lying around

by people . . . we call it good housekeeping . . . we have a legal right to pick up any handouts left lying around the building . . . it is perfectly O.K. to 'police up' this building"; that in mailing material to the Union at the Union's expense, the Respondent was merely taking the Union at its word; and that employees would lose their rights to deal with the Respondent on wages, hours, and other terms and conditions of employment "if too many make the mistake of signing cards." In the other, distributed on about March 20, Bain referred to the ETA having "sullied the office again with another of their handouts, and it needs correction as usual." One of these corrections stated that the Respondent "always had the right to remove the hand bills from your work stations."

The Respondent, just before the close of the hearing, proposed to stipulate, and the other parties agreed,[4] that since May 28, 1974, unit employees have distributed Union literature on two occasions at the four entrance doors to the office, and that at the time of such distribution the Respondent placed trash barrels there "with a sign on the barrels saying 'PLACE TRASH HERE' with emphasis on the E.T.A. portion or letters of that legend."

B. *Contentions of the parties*

The General Counsel maintains that the Respondent interfered with the distribution by its employees of Union materials during nonwork time, in violation of their Section 7 rights.

The Respondent, at the hearing and its brief, urges dismissal of the complaint in its entirety. It argues that it did not stop employees from distributing Union literature,

[4] The General Counsel stipulated to the accuracy of the facts but questioned their relevance.

that the entire issue is whether an employer is required to leave union literature at unattended work stations to await its employees' arrival at the office, that the answer is that it is not required to do so, and that there was nothing unlawful in the Respondent's conduct in picking up these materials from unattended work stations, in mailing back to the Union, but not signing, "authorization cards in prepaid envelopes saying sign and mail back," or in the Respondent's remarks included in the stipulation of facts.

C. *Discussion*

The stipulated facts show that unit employees distributed a Union leaflet on November 30, 1973, by placing it on employee desks and work stations before working hours; that, after a similar distribution was made on December 4, the Respondent prepared a written response and distributed it to the employees on December 6 during work time; that the employees before working hours on December 13 distributed a Union leaflet which had an application card and prepaid envelope attached to it; that, on the same day, four supervisors of the Respondent removed these materials from unattended work stations between 7:45 and 8:15 a.m., although most of the employees started work at 8 a.m.; that one of the supervisors, Anderson, commented that he would "fix the union by mailing the authorization cards back to the union," and the supervisors detached and mailed to the Union about 126 unsigned cards; that this conduct was repeated on February 4, 1974, with Anderson commenting that he was not interested in the letters but only in the attached cards, and the supervisors mailed about 171 unsigned cards to the Union; and that, on February 20, a Union leaflet was distributed in the same

way by the employees, and was removed the same morning by the same four supervisors.

Bain, the Respondent's general manager, prepared written responses to some of the Union leaflets. These were distributed to the employees at their work stations during work time. In these responses, the Respondent took issue with statements in the Union leaflets, and warned the employees against signing authorization cards on the basis of what the Union told them. Bain's responses did not direct the employees to discontinue or change their method of distribution. No complaint about such distribution was made to the employees by any other company official. There was apparently no company rule forbidding such distribution. The Respondent from time to time distributed non-work literature and pamphlets to the unit employees at their work stations. There is no showing that the employees' distribution created a littering problem or safety hazard, nor that the Respondent removed these materials to avoid interference with the employees' performance of their duties. The contrary is indicated by the fact that the Respondent on several occasions permitted literature that had been distributed to remain on the desks or work stations, and was concerned, as a supervisor stated, primarily with the authorization cards attached to some of the leaflets.

It is clear that unit employees distributed the Union materials during nonworking hours. It is likewise clear that they distributed those materials in the work area, placing them on the desks and work stations of the central accounting office employees. There was, however, no rule prohibiting such distribution, and no such rule was set forth in the Respondent's responses to the Union literature. I find, therefore, in all the circumstances of this case, that

such distribution before working hours by unit employees was a protected concerted activity.[5] I also find that, as unit employees had a right to distribute Union materials in this way, other unit employees likewise had a right to receive these materials, including the attached authorization cards and prepaid envelopes. The Respondent has presented no evidence that its confiscation of Union materials was pursuant to a valid rule, necessary to maintain cleanliness, order, discipline, safety, or production at its central accounting office, or warranted under special circumstances such as have been held to apply to selling areas of stores. The record in fact indicates that the Respondent was concerned not so much with the distribution of the Union literature as with the availability of the authorization cards for the consideration of the unit employees.

The Respondent has maintained, at the hearing and in its brief, that it was entitled, in accord with *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, to pick up at unattended work stations Union materials which had been distributed in a work area. As stated in the Respondent's brief, "Under the rationale of *Stoddard-Quirk*, the Respondent admits it restricted distribution of literature in work areas—it had a right to do so." That case was concerned, however, with the validity of a shop rule prohibiting distribution of literature in the shop. There is no showing that the Respondent had such a rule. Moreover, as the Board stated in that case, at 621, "where it is shown that the imposition or enforcement of restrictive rules in this overall area flow not from the employer's right to protect his legitimate property interests, but rather from his desire

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[5] See *Halliburton Co.*, 168 NLRB 1091; *Massey-Ferguson, Inc.*, 211 NLRB No. 64.

to obstruct the employees' statutory right of self-organization, the immunity otherwise accorded him in this regard is forfeited [citations omitted]." The evidence in the present case does not show that the Respondent confiscated certain of the Union materials that had been distributed to its employees, and in some of these instances detached and sent to the Union unsigned authorization cards, in order to protect its legitimate property interests.

The Respondent also relies on *J.H. Rutter-Rex Mfg. Co.*, 164 NLRB 5, as "one case whose facts parallel the instant one." There, an employee brought in union literature and left it lying around in the warehouse; a supervisor brought it to the employee and told him to "throw this trash away"; the employee refused to do so but retained it; and the employee, when told by the supervisor to do so, gathered up the rest of the literature. The supervisor's comments and action were found not to be unlawful interference with employee organizational rights. The employer in that case, however, did not confiscate or dispose of the union literature, but returned it to the employee who brought it to the warehouse.

The Respondent asserts in its brief that "General Counsel appears to take the untenable position that once a union distributed or has distributed propoganda [sic] in a working area, the propoganda becomes sacrosanct and must remain there perpetually." The Union literature here involved, however, was confiscated by the Respondent directly after it was distributed. The Respondent also contends that it had a right to pick up Union materials at the employees' unattended work stations as it did not take these materials away from the employees in person. The Respondent has not shown, however, that "the mere presence of the union material" in the central accounting

office interfered in any way with production or discipline.[6] Further, the Respondent contends that it had a right to mail to the Union the unsigned cards in the prepaid envelopes because the printed legend thereon so requested. I find no merit in this contention.

The record as stipulated shows that the Respondent removed certain Union materials from unattended desks and work stations in the central accounting office, and that on two occasions it detached unsigned Union authorization cards and prepaid envelopes and mailed large numbers of these cards to the Union. The Respondent has presented no evidence that this conduct was pursuant to a valid rule or was necessary to maintain production or discipline. I find, in all the circumstances of this case, that the Respondent confiscated and disposed of Union authorization cards and other Union materials not on the basis of a valid business purpose but in order to discourage Union membership and activities that this conduct of the Respondent constituted an unreasonable impediment to its employees' self-organizational rights, and that the Respondent thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.[7]

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[6] *Hyland Machine Company*, 210 NLRB No. 148.

[7] See *Champa Linen Service Company*, 140 NLRB 1207, 1210; *Zayre Corporation*, 154 NLRB 1372, 1379; *Plasticoid Company*, 168 NLRB 135, 137; *Schwarzenbach-Huber Company*, 170 NLRB 1532, 1535; *Dixie Wire Corporation*, 182 NLRB 211; *Hyland Machine Company, supra; Larand Leisurelies, Inc.*, 213 NLRB No. 37.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that the Respondent be ordered to cease and desist therefrom and from infringing in any like or related manner upon its employees' Section 7 rights, and that it take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel in its brief requests that the Respondent be directed to reimburse the Union for the postage costs incurred when the Respondent mailed the unsigned authorization cards to the Union. This request is hereby denied as I deem the cease-and-desist provisions and posting of a notice adequate in the present circumstances to remedy the violations herein found.

Upon the basis of the foregoing findings of fact and the entire record in this proceeding, I make the following:

Conclusions of Law

1. The Respondent, F. W. Woolworth Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Office and Professional Employees International Union, Local No. 9, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By confiscating Union literature that had been distributed to unit employees in its central accounting office, and by mailing to the Union the unsigned authorization cards in the prepaid envelopes that had been attached thereto, in order to discourage membership in and activities on behalf of the above-named union, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[8]

Order

The Respondent, F.W. Woolworth Co., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall:

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[8] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Appendix C

1. Cease and desist from:

(a) Interfering with the distribution of union literature and authorization cards to its employees in the central accounting office in order to discourage membership in and activities on behalf of Office and Professional Employees International Union, Local No. 9, AFL-CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its operations in Milwaukee, Wisconsin, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 30, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[1] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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(b) Notify the Regional Director for Region 30, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C.

/s/ ANNE F. SCHLEZINGER
Anne F. Schlezinger
Administrative Law Judge

Appendix D

National Labor Relations Act as Amended Sections 7 and 8

National Labor Relations Act as Amended 29 U.S.C. Section 151 et seq.

Section 7. "Rights of Employees"

Employees shall have the right to self-organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection, and shall also have the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 8. "Unfair Labor Practices"

(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7;—